

79938-5
COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

IN RE THE MATTER OF ANGELO FLORES-CORK

DAVID NAGEL & ANITA BANGERT

Respondents

v.

HOLLY MARIE CORK

Appellant

No. 229301-III

APPELLANT'S REPLY BRIEF

ANDREA POPLAWSKI
Attorney for Appellant
35 W. Main, Suite 300
Spokane, WA 99201
(509) 835-5211
WSBA #32246

TABLE OF CONTENTS

I. RESPONDENTS' MISSTATEMENT OF FACTS	4
II. REPLY ARGUMENT	14
1. RESPONDENTS FAIL TO DISTINGUISH THE ONTROLLING CASE: IN RE PARENTAGE OF L.B.....	14
2. THIS COURT LACKED JURISDICTION TO ALLOW THIS MATTER TO CONTINUE BECAUSE THE PETITIONERS FAILED TO MAKE A SHOWING THAT WASHINGTON HAD SUBJECT MATTER JURISDICTION OR THAT HOLLY CORK WAS AN UNSUITABLE CUSTODIAN AT THE TIME THE PETITION WAS FILED AS REQUIRED BY RCW 26.10.030.	18
3. THE USE OF THE "PSYCHOLOGICAL PARENT" THEORY AS A BASIS TO AWARD CUSTODY TO FOSTER PARENTS IS NOT ONLY AGAINST PUBLIC POLICY, BUT WOULD DEBILITATE THE ENTIRE FOSTER CARE PROGRAM.....	23

TABLE OF AUTHORITIES

Cases

<u>In re Custody of R</u> , 88 Wn.App 746,762(1987)	19, 20
<u>In re Custody of Shields</u> , 120 Wn.App 108, (2004)	14, 15
<u>In re Marriage of Allen</u> , 28 Wn.App.637 (1981).....	14, 15
<u>In re Marriage of Ieronimakis</u> , 66 Wash.App. 83, 831 P.2d 172.....	19
<u>In re Parentage of L.B.</u> , 121 Wash.App.460, 89 P.3d 271, (2004)....	14, 15, 16, 18
<u>Marriage of Zadorozny</u> , 70 Wn.App. 464 (1993).....	20,21
<u>Skagit Surveyors & Eng'rs, LLC v. Friends</u> , 135 Wn.2d 542, 556, 958 P.2d 962 (1998).....	19
<u>V.C. v. M.J.B.</u> , 163 N.J. 200, 748 A.2d 539 (2000)	15

Statutes

RCW 26.10.030	18, 21
RCW 26.27.021	18
RCW 26.27.030	21
RCW 26.27.050	21
RCW 26.27.061	19

Other Authorities

UCCJEA	18, 19
--------------	--------

I. RESPONDENTS' MISSTATEMENT OF FACTS

The Respondents have responded to the opening brief of the Appellant, Ms. Cork and provided a set of facts in this matter, which for the most part are taken out of context and unsupported by the record. The most pertinent of these misstatements are addressed as follows.

The Response Brief from page 5 through page 8 consistently refers to allegations of past unfitness of Ms. Cork somehow in an attempt to mislead this court into thinking Ms. Cork has been an unfit parent since the moment she gave birth to Angelo up to and including the date of trial. However, the allegations of past unfitness refer to when she was a 14 years old. *RP 496* The allegations relate to a time period when not only was she a minor, and prior to the state of Montana restoring her parenting rights to her son. All allegations relate to a time prior before this court had an opportunity to evaluate Ms. Cork's current fitness to parent her son, Angelo. The Respondents correctly point out that the Montana Supreme Court did not initially make any determination of Ms. Cork's fitness to parent Angelo when they ruled in her favor; that issue was not before them. *EX R109* Respondents failed to mention that immediately after the court's decision to return Angelo to Ms. Cork, Ms. Cork voluntarily availed herself of a complete investigation by Montana DPHHS to make the determination of whether or not she was a fit parent. *RP 481, line 5-*

25, RP 492, RP 659, line 6-15. After a complete investigation, individual and family counseling, psychological evaluations, drug and alcohol testing, parenting assessment, etc., the State of Montana determined that Ms. Cork was a fit parent. RP 492, RP 495, RP 496. No dependency action was filed nor was there any civil action filed by the Respondents for custody of Angelo. In fact, the Respondents were strictly warned by the reunification team in Montana that any interference with the bonding process of Angelo and Holly would be detrimental to Angelo's well-being. EX R107, page 2, RP 615, line 19-24.

On May 15, 2002, Holly and Angelo Cork moved to Spokane, Washington. Even though the Montana Courts did not find any evidence of unfitness, abuse, neglect, etc. that would warrant the courts to interfere with her care and custody of Angelo, the Petitioners, themselves did not like Ms. Cork's care of her son Angelo. RP 653 The Petitioner's knew they could not file an action in Montana because they were strictly warned not to interfere with the bonding of Holly and Angelo, so approximately 2 weeks premature of the required six months residency requirement, the Respondents filed for NonParental Custody of Angelo Cork in Washington.

Page 9: *"After Holly Cork returned to Washington serious concerns quickly arose over her stability, the environment Angelo was placed in,*

and her care/treatment of Angelo. (citing RP 78-80; RP84, line 9; RP592-593 among others)”

Respondents try to persuade this court Angelo was in some sort of danger in Ms. Cork’s care. However, no one had serious concerns, except the Respondents. This was the same situation of Respondents trying to replace Ms. Cork’s parental decisions with that of their own as during the reunification in Montana. *RP 486, line 16, RP 495, RP 651, RP 654-655, P659, RP 660, RP 726.* Those sections of the record cited by Respondents are discussed as follows.

RP 78-80: When the Guardian ad Litem “spoke with the [Respondents] initially one of the things that [she] talked about was kind of what are [their] concerns.” *RP 79, line 23.*

RP 84, line 9: Respondents cite to “calls-for-service” at Ms. Corks home in support of these “serious concerns.” However, these “calls-for-service” refer to police records for an address that was not Ms. Cork’s. The Guardian ad Litem requested calls for the incorrect address. *RP 146, line 15 - RP 146, line 8.*

RP 592-593: This is testimony from the Respondent on her own opinion regarding Ms. Cork and her care of Angelo, nothing more. Even this court clearly ruled that there was no finding that Holly Cork is an unfit parent. *RP818.* These “serious concerns” of the Respondents came shortly after

Ms. Cork denied them contact with Angelo. After this denial of contact, an “anonymous” phone call was made to Spokane Child Protective Services (CPS) about Holly Cork. Respondents denied making this call. *RP593, line 20-21.* Trixie Fransden’s CPS investigation included contact with Vicki Weida, the reunification social worker in Montana. That conversation indicated she thought the caller was the Respondents as “it’s too much information” for it not to be. *EX R115(Activity Date 10/7/02 Document)* After CPS conducted a thorough investigation of the allegations of abuse and neglect by Ms. Cork and her ability to care for Angelo, the case was dismissed as “unfounded” allegations. *EX R115, RP 744-745.* That same day, the Respondents filed their Petition for NonParental Custody. The Respondents did not want Ms. Cork to have Angelo, they wanted Angelo to be their child, as indicated in their discussion with Liz Hayden shortly before Angelo and Ms. Cork moved to Spokane. *RP 653-655.* Respondents talked about it “being unfathomable (one of their own words) that Angelo would be returned to his mother.” *See EX R129, page 2.* Respondents were exceedingly hostile and rude to Ms. Cork and consistently tried to hinder Ms. Cork and Angelo having a healthy relationship. *RP 712-713*

In other sections of their Brief, Respondents greatly misstate other facts of this case and/or present the evidence entirely out of context:

Page 9: *"In fact, Ms. Cork never sought counseling for Angelo until required by court order in this matter."*

At no point was Ms. Cork ever required to seek counseling. She had a fundamental right to make decisions regarding her child's care, particularly whether or not to seek counseling. In large part, Ms. Cork's decision not to place Angelo in counseling was consistent with that of other mothers who were reunified with their children after a dependency action. *RP 502, RP 726.* This decision might be different from others who are avid users of counseling because the decision would rest mostly on how Ms. Cork felt her interactions with Angelo were going. *RP 188, RP 502, RP 508, RP 785*

Ms. Cork did not notice any significant problems at home. However, once the school counselor recommended counseling in late Spring 2003, Ms. Cork did in fact schedule an appointment for her son. *RP 215, RP 780-782, RP 787.*

Page 9 through 10: *"Angelo's behavior was seriously deteriorating at school, and he was labeled as a child in crisis by his teacher and school counselor."*

Respondents fail to explain to this court that Angelo was thriving in school and doing fine at home with his mother for the entire time he was solely in her care without contact from the Respondents. *RP 782-783, RP 814, line 13-17.* It was not until Respondents re-entered his life that he

began having problems. Angelo did not become a child in crisis until almost seven months after the petition was filed, which was at the point when the Respondents were significantly involved in his life. *RP 157-159, RP 163-166, RP 194-195, RP 202, RP 206, Rp212.*

Page 10: *"Mary Ronnestad was appointed as child's Guardian ad Litem, and because of her concerns over Angelo's behavior and well-being, she requested that Carol Thomas be appointed as the child's counselor."*

This statement is misleading in that it failed to indicate that the Guardian Ad Litem was appointed only after the Respondents forced their way back into Angelo's life. *RP 127* It was only after their re-involvement that the child began having significant behavioral and emotional problems and there was a need for a Guardian ad Litem. This appointment was approximately seven months after the Petition was filed. *RP 127* At not time was the Guardian Ad Litem able to evaluate Holly and Angelo Cork without the interference of the Respondents.

Page 10: *"Ms. Cork was not initially compliant in working with Carol Thomas despite the counseling order."*

Respondents cite *RP 116, line 8-17* for this statement, however, the record actually indicates that Ms. Cork was not timely in meeting with Ms. Thomas due to her recently having a baby, etc. The record does not reflect she was not compliant in working with Carol Thomas. Ms. Cork further

testifies that she called Ms. Thomas for an appointment but no appointments were available until mid summer.

Page 11: *"If not placed in their primary care, great concerns exists regarding his emotional well-being, putting him at risk for increased depression, social withdrawal, excessive rebellion, self-destructive behaviors, and violent behaviors towards others."*

This statement of Carol Thomas was made after the Respondents were extensively re-involved back into Angelo's life by the Spokane courts. Ms. Thomas clearly indicated she never had the opportunity to observe Angelo's behavior when the Respondent's were not involved in his life. *RP 443, line12-24.* Ms. Thomas testified she never reviewed the Report of Robert Dickey which indicated Angelo actually did have significant behavioral problems for several months during his placement with the Respondents. *RP 435, line16-22.* Ms. Thomas when making that statement was not aware that Angelo assaulted another child after he was placed with the Respondents as she advised. *RP 435, line2 –RP 436, line 1.*

Furthermore, Ms. Thomas admitted that she failed to speak with any member of the team of professionals intimately involved with the reunification process in Montana. She never spoke with Angelo's previous counselors in Montana. She never spoke with his therapist or case workers prior to starting her assessment, evaluation and her

recommendation of placement of Angelo Cork. *RP 439, line 9-RP 440, line 7.*

Lastly, Ms. Thomas admitted at trial that at the time she made this recommendation to place Angelo with the Respondents she was completely unaware of there was a team of professional counselors, therapists and social workers warning the Respondents not to interfere with Holly and Angelo's reunification and that any interference would be considered damaging to Angelo's well-being. *EX R107, p2, RP 440, line12-25. RP615, line19-24*

Page 25: *"Both the teacher and counselor witnessed the child's emotional acting out in school and his emotional deterioration while in the care of Holly Cork and were the exclusive sources of information to the Guardian ad Litem and court."*

The emotional acting out and emotional deterioration of Angelo was not "while in the care of Holly Cork." Rather, these problems were directly related to re-involvement of the Respondents. Angelo's teachers clearly state that problems began in the second semester of school, shortly after Christmas break and continued to escalate throughout Spring. This was exactly the time Respondents were thrown back into Angelo's life and continued their involvement with him. *RP 782-783* Even the Court recognized that things were going well for Angelo in September 2002,

during the time the Respondents were not involved with Angelo. *RP 814, line 13 -17.*

Page 25: *"There are substantial issues regarding Mr. Rich's adverse effect on Angelo. Mr. Rich's felony and misdemeanor criminal history and records of incarceration are in Washington.... Evidence of Mr. Rich's use of marijuana and Angelo's exposure to it are located exclusively in Washington."*

Evidence support that the only criminal history Mr. Rich had was when he was a juvenile. That consisted of one felony conviction for stealing cigarettes in 2000 when he was a minor. *RP 152-153.* No evidence supports any use of marijuana by Mr. Rich or anyone in Ms. Cork's home or any evidence of exposing Angelo to drugs or drug use. *RP 133, RP 184.* Evidence actually supports Mr. Rich being a father-figure to Angelo. *RP 218*

Page 26: *"Evidence of significant police activity at and/or involving Holly Cork's residence(while caring for Angelo) is located exclusively in Washington."*

Actual testimony indicates the Guardian ad litem presented police calls for a residence that was not where Holly Cork resided; she never did any police calls for Ms. Cork's address nor did she visit that home. There was no evidence to support any criminal activity at Ms. Cork's home. *RP 144, line 22 through RP 147, line 7*

Page 11: *"After placement with the [Respondents], Angelo's behavior began to rapidly improve.... [h]is school performance also rapidly improved and he became 'right up there on the top of his class and was one of the teacher's better performers.'"*

This is a complete misstatement of the truth. The reality is that evidence clearly supports that it was not until the Respondents were reintroduced into Angelo's life that his behavior began to deteriorate. *RP 158-159, RP 163, RP 194-195*. Prior to this time, Angelo was doing great in the care of his mother. *RP 178, RP 212, RP 202*. Ms. Cork testified that when the Respondents were not involved in Angelo's life his behavior was excellent and they were re-establishing their previous bond. *RP 780-782*. Furthermore, if she felt his behavior was at a point where he needed counseling, she would have got it for him. *RP 785* Angelo's teachers testified there were no concerns during this time. *RP 157-158* The longer the Respondents remained involved with Angelo the more his behavioral problems escalated out of control. *RP 163, line 14-20, RP 164 -166, RP 194-195, RP 196, RP 206, RP 212*. Even after the child was placed with the Respondents at the end of August 2003 (as recommended by Carol Thomas) his behavior continued to be problematic. *RP 317* Angelo told his counselor he wanted to be back with his mother, Ms. Cork. *RP 344*.

Once the Respondents were granted custody of Angelo in August, 2003, he was placed in school at Four Georgians Elementary in Helena, Montana. However, testimony at trial verified that the Respondents enrolled the child in kindergarten for the second year in a row, *RP 318*

even though his school work the prior year in kindergarten was just fine and there was no evidence to support he needed to repeat kindergarten. *RP 157-158, RP 178-179, RP 202-203*. If the Angelo was “one of the teacher’s better performers” as asserted by Respondents, it was most likely due to him repeating kindergarten and not due to his placement with the Respondents. *RP 319*.

II. REPLY ARGUMENT

1. RESPONDENTS FAIL TO DISTINGUISH THE CONTROLLING CASE: IN RE PARENTAGE OF L.B.

Respondent’s Brief, argued several older Washington cases on the issue of nonparental custody. Respondents completely ignored the most critical and recent case directly related to psychological bond between a child and a non-parent. In re Parentage of L.B., 121 Wash.App.460, 89 P.3d 271, (2004). Respondents, in arguing that custody of Angelo Cork should be awarded to the them, rely on the standard established in In re Marriage of Allen, 28 Wn.App.637 (1981) and heavily on In re Custody of Shields, 120 Wn.App 108, (2004) and that court’s holding that “while the detriment standard does not require a showing of unfitness, it does require a showing of actual detriment to the child’s growth and development. *Response Brief*, p.37. Since Shields, new case law has created four criteria that must be met before any petition for co-parentage or visitation of a

child will be entertained. In re Parentage of L.B., 121 Wash.App.460, 89 P.3d 271, (2004). In determining these threshold requirements, the L.B. court carefully considered all of the same cases Respondents cite in their Response Brief. Id. The L.B. court was very cognizant of the importance of a psychological bond between a child and a non-parent. However, the manner in which the court balanced the constitutional rights of the natural parent to the care and custody of their child with that of a person having a psychological bond with the child was to ensure these four critical factors were first met. This followed suit with case law from other jurisdictions that the L.B. court considered. Most importantly and present in law from other jurisdictions was the first threshold factor which requires *the legal parents consent and support of the relationship between the psychological parent and the child*. By making this factor a threshold requirement, recognition of the relationship [such as that of the Respondents and Angelo] does not intrude on the legal parents basic liberty interests in raising a child as he or she sees fit. V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000). Accordingly, any evidence supporting a claim of actual detriment to Angelo's growth and development cannot even be considered if the four criteria are not first met. Ms. Cork's Brief on Appeal, outlined and discussed the L.B. court's four factors which would need to be met to consider such a theory as used in Allen and Shields to expand the statutory

requirement of “detrimental to the child’s growth and development” and “psychological bond” with child to obtain custody. The Respondents needed to present sufficient evidence that: 1.) [Holly Cork] consented to and fostered the parent like relationship; 2.) [The Respondents] and the child lived together in the same household; 3.) the [Respondents] assumed obligations of parenthood without expectation of financial compensation, and 4.) the [Respondents] have been in the parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Of these factors, the most notable, which has been present in L.B. and nearly all the cases prior to L.B. that have transferred placement from an otherwise fit parent to a nonparent, is the biological parent’s consent to and fostering of the relationship between the child and nonparent. The required “consent to and fostering of the relationship” simply is not present here. All evidence contradicts any “consent to or fostering of” on Ms. Cork’s part to such a relationship. Ms. Cork has always wanted to have Angelo in her sole custody, care, and control even during the Montana appeal process. *RP 646, 647.* This case is unusual because the basis for the relationship/bond between Respondents and Angelo Cork is based on the unconstitutional conduct of the State of Montana, not any voluntary conduct of the child/s mother, Holly Cork. The state of

Montana initially denied Ms. Cork the right to make the decisions regarding her child.

It is clear from the facts and evidence that Angelo had bonded and attached to his mom during his first two years of life when he was in her care and custody. The initial time Angelo was removed from his mother, Ms. Cork's care and their bonding and attachment was interfered with without her consent; the State of Montana began a dependency proceeding and placed Angelo in foster care. The second time the child was removed from her care permanently and her bonding and attachment was interfered with was when the State of Montana unconstitutionally terminated her parental rights; again without her consent. The third time her bonding and attachment was interfered with was when the foster parents after being warned not to interfere, came to Washington and filed a Petition for NonParental Custody and sought court ordered visitation in late December 2002; this was without Ms. Cork's consent. The fourth time her bonding and attachment was interfered with was when Washington court granted temporary placement with the foster parents in August 2003; again without her consent. The last time her bonding and attachment had been interfered with was this court's final determination that the Petition for NonParental Custody would be granted and child was permanently removed from mom; without her consent. It has been during every single

incident that mom had not “consented to [nor] fostered the parent like relationship” with the foster parents that the “psychological bond”

occurred and is now being used by the trial court as the basis to deny Ms.

Cork her constitutional right to the care and custody of her child.

Respondents have not addressed the factors mandated by L.B. because they simply cannot meet the burden of proof on all four factors. Instead they have focused eight pages of their argument on Carol Thomas’ incomplete testimony. The court cannot even consider this testimony if the threshold factors of L.B. have not been met. The testimony of Carol Thomas is severely flawed and inadmissible for additional reasons as outlined in Ms. Cork’s Brief on Appeal.

2. THIS COURT LACKED JURISDICTION TO ALLOW THIS MATTER TO CONTINUE BECAUSE THE PETITIONERS FAILED TO MAKE A SHOWING THAT WASHINGTON HAD JURISDICTION OR THAT HOLLY CORK WAS AN UNSUITABLE CUSTODIAN AT THE TIME THE PETITION WAS FILED AS REQUIRED BY RCW 26.10.030.

Under the Findings of Fact, Section 2.4 Standing, indicating that Respondents had standing to commence this action because Ms. Cork waived subject matter jurisdiction and she is not a suitable custodian are in error of law. The Respondents did not have standing to bring this action

because Washington did not have subject matter jurisdiction and Ms. Cork was and continued to be a suitable custodian for Angelo.

First, the petition was filed on October 29, 2002, at which time, Holly and Angelo Cork were only residing in Washington for 5 ½ months. Pursuant to the UCCJEA, Washington must be the “home” state of the child on the date of the commencement of the proceeding in order for the state to have jurisdiction of the matter. Under RCW 26.27.021, “home state” means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. Section (5) of this statute defines “commencement” as the filing of the first pleading in the proceeding. Under UCCJEA, jurisdiction is to be determined as of the time action is commenced. In re Marriage of Ieronimakis, 66 Wash.App. 83, 831 P.2d 172, *review denied* 120 Wash.2d 1006, 838 P.2d 1142. (1992). Commencement in this case would be October 29, 2002; the date the Petition was filed.

Respondents argue that Ms. Cork waived subject matter jurisdiction by not raising the matter sooner and by admitting to jurisdiction in her Response to the Petition. However, it is well-established that litigants may not waive subject matter jurisdiction, and furthermore, a party may raise that issue at any time. In re Custody of R.

88 Wn.App 746,762(1987). Summarily, lack of subject matter jurisdiction renders the court powerless to pass on the merits of the case. Skagit

Surveyors & Eng'rs, LLC v. Friends, 135 Wn.2d 542, 556, 958 P.2d 962

(1998). Here, since the facts are undisputed that Angelo and Holly Cork moved to Spokane on May 15, 2002 or later and the Petition was filed on October 29, 2002, Washington Court clearly lacked subject matter jurisdiction; the case must be dismissed and all orders made on the merits of the case are null and void.

Respondents incorrectly argue that the UCCJEA provides for waiver of subject matter jurisdiction at RCW 26.27.061. *Response Brief*, p.30. The statute discusses binding of "all persons...who have submitted to the jurisdiction of the court." This refers to individuals who have submitted themselves to personal jurisdiction, not subject matter jurisdiction. Respondents then incorrectly argue waiver of subject matter jurisdiction by confusing the ruling of Marriage of Zadorozny, 70 Wn.App. 464 (1993). In that case, the Washington court never ruled on jurisdiction. The decree was binding on the husband not because of any law that allows waiver of subject matter jurisdiction but rather because he never appealed the ruling on personal or subject matter jurisdiction. Furthermore, the law Respondents cite to in that case is under UCCJA

RCW 26.27.030 and RCW 26.27.050. Id. at 470. However, both of those statutes were repealed in 2001 and not applicable here

Second, the Respondent lack standing pursuant to RCW 26.10.030, which requires that a person other than a parent, can file a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, but *only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian*. Since it is undisputed that Ms. Cork had, at that time, physical custody of her son Angelo, the Respondents needed to prove that Ms. Cork was not a suitable custodian.

The alleged support for asserting that Ms. Cork was an unsuitable custodian at the time the petition was filed was a self serving declaration by the Respondents. In that declaration the Respondents asserted that “we are concerned,” and nothing more. The rest of their declaration was a profession of their love for Angelo Cork. Then the Respondents concluded with the self service statement that “it is clearly not in his [Angelo’s] best interest to be back with his mother in light of the way she neglects and mistreats him.” However, no allegations of neglect or mistreatment were alleged in the declaration.. At no point did the Petition indicate Angelo and the Respondents had a “psychological bond” that would make

placement with Ms. Cork detrimental to the child's continued growth and development.

The Respondents merely attached irrelevant, self serving exhibits presenting no evidence of neglect or mistreatment shown at the time the petition was filed on 10-29-02 or otherwise.

Last, testimony and evidence presented at trial and in pretrial motions supported that the Respondents lacked standing to bring this action, as Angelo Cork was in the care and custody of his mother, Holly Cork and Ms. Cork was a suitable custodian at the time of commencement and at the time of trial. No evidence was presented to the contrary. The required affidavit in support of the Petition was not filed at the commencement of the action. The evidence supported that Ms. Cork was a fit parent, she had a very stable living arrangement and she has done very well considering her roots. The Court specifically found that Ms. Cork was not an unfit parent. *RP 818* Furthermore, this Court, in large part, based its findings to transfer placement on the fact that the foster parents "are the psychological parents" to Angelo Cork. At the time of commencement, there was no evidence indicating the Respondents were the psychological parents to Angelo Cork, nor did they allege it in their Petition. Ms. Thomas did not complete any evaluation of bonding or attachment between Angelo and the Respondents or Angelo and Ms. Cork

prior to filing the Petition. *RP 211*. All evaluations were made after the foster parents were thrust back into Angelo's life, which was almost an entire year later.

On December 27, 2002, Spokane County Superior Court Commissioner Aronow lacked jurisdiction to make any decisions regarding Angelo Cork because the declaration of the foster parents provided no evidence of neglect, mistreatment or unsuitability at the time the petition was filed on 10-29-02, no evidence presented to support mental, emotional or physical detriment to the child in the custody of his mom, and nor evidence of any "psychological bond" between the Petitioners and Angelo or lack thereof between Ms. Cork and Angelo. In December 2002 there were no negative reports from Angelo's school. Reports of negative behavior began only after Comm. Aronow ordered visitation for the Respondents to resume. This Court at time of trial lacked standing to make any decisions regarding Angelo Cork.

3. THE USE OF THE "PSYCHOLOGICAL PARENT" THEORY AS A BASIS TO AWARD CUSTODY TO FOSTER PARENTS IS NOT ONLY AGAINST PUBLIC POLICY, BUT WOULD DEBILITATE THE ENTIRE FOSTER CARE PROGRAM

Illegal and reprehensible conduct of a third party that benefits another cannot later be used against an innocent biological parent by that

other person to deprive the biological parent of custody of her child. Such a rule is clearly against public policy and cannot stand. Here, The State of Montana's actions in initially terminating Ms. Cork's parental rights were unconstitutional and thus, illegal. The Respondents greatly benefited from that illegal conduct. The Respondents formed a bond with Angelo through unlawful conduct of the state of Montana in denying Holly Cork the care and custody of Angelo. The Respondents had every intention of being Angelo Cork's permanent parents, initially they thought it would happen through the foster/adoptive program of the State of Montana. When that was not possible they decided to use Washington's NonParental Custody statute to do so.

The Respondents continued to intervene in Ms. Cork's bonding process with her son even after they were clearly informed not to interfere. *RP 712-713* At no point did Ms. Cork consent to her child being placed in the care and custody of the Respondents nor did she foster the relationship that formed a bond between the child and the Respondents. The trial court used that bond to remove Angelo from the care and custody of his mother, Ms. Cork. Washington State is barred from consideration of this bond with the foster parents due to the illegal conduct that created the bond, to do so otherwise would be against public policy.

For example, in the sensational case out of Utah regarding the minor Elizabeth Smart, a man abducted Elizabeth Smart and she eventually bonded and became attached to her abductor and his wife. If the man was charged with abduction and the wife was not, according to the ruling by this court, the wife could file for third party custody in Washington and cite the “bond” she has with the child and her status as “psychological parent” to the child. This cannot be the rule. Illegal conduct that benefits a third party cannot later be used against the biological parent by the third party.

In its Findings, the Court cited no testimony or evidence presented by Vicki Weida, David Strum, or Liz Hayden as it relates to the interference of the Respondents in not only Ms. Cork and Angelo’s bonding and attachment, but evidence of how their behavior demonstrated complete disregard for Angelo’s well- being. This evidence was critical to a complete understanding that the “behavioral problems” the Guardian ad Litem and Carol Thomas relied upon in recommending placement with Respondents was in most part the outcome of Respondents continued interference in the child’s life.

Respondents had every intention of having permanent custody of Angelo Cork. When Angelo was first placed in fostered care with them, they knew he was not eligible for adoption. *RP 642*. However, within

only a few weeks they made up their mind they were going to adopt him knowing he was a child in foster care. *RP 642*. Respondents made it very clear that they were never interested in being foster parents, they wanted to adopt Angelo. *RP 654, 658*. After Ms. Cork filed an appeal of the termination of her parental rights, it became necessary for Respondents' caseworker, Liz Hayden to have them sign a Legal Risk Adoptive Agreement to ensure they knew Angelo was not free for them to adopt. *RP 643*. Once it became apparent that Angelo would be returned to his mother, the Respondents were not supportive of the reunification. *RP 651*. In fact, the Respondents became considerably angry about Angelo returning to his mother, Ms. Cork. *RP 653*. It appeared that the Respondents were trying to delay the reunification in hope that Ms. Cork would make a mistake so that Angelo would not be returned to his mother. *RP 500*. In fact they even hired an attorney during the process. *RP 654*. It was made very clear to the Respondents "that interference with or failure to support Angelo in permanency with birth mother may be considered damaging to his general welfare..." *RP 659*. However, Respondents still interfered with relationship of Ms. Cork and Angelo during the critical reunification process, and expressed anger toward Appellant in front of Angelo. *RP 652*. Ms. Hayden testified that the Respondents' behavior and expression during the reunification made her

very concerned that their desire to be Angelo's parents and inability to allow Angelo to have a reasonable relationship with his mother, Ms. Cork, would interfere with his [Angelo's] ability to feel safe with his mother and to find security there with his feelings about himself. *RP 659*. It was Respondents' need to be Angelo's parents that was getting in the way. *RP 659* Angelo needed to transfer his attachment to his mother, Ms. Cork, and Respondents were interfering with that while he was in Montana. *RP 660*. It was important the Respondents contact with Angelo be cut for at least six months to a year to allow the new bond between Ms. Cork and her son to set itself. *RP 503*.

Ms. Cork and her son moved to Washington, but Respondents could not let go of their desire to be Angelo's parents; they continued to interfere in the attachment and bonding process despite their warning by filing a Petition for NonParental Custody of Angelo and forcing their re-involvement in his life, knowing how disruptive it would be to his general welfare. *RP 486, line 2-19*. It was never Ms. Cork's actions or inactions that made placement of Angelo with her detrimental to his growth and development, but rather it has always been Respondents' insatiable desire to have Angelo as their own child that has and continues to be detrimental to his general welfare. On the other hand, it was Ms. Cork, Angelo's biological mother that truly cared for Angelo's welfare when she

voluntarily decided to undergo a reunification process with Angelo instead of just asking him with her and moving to Spokane. It was Ms. Cork, not the Respondents who placed Angelo's wants and needs above their own.

RP 659, line 16. This type of inexcusable behavior by the Respondents cannot be rewarded by taking this child away from his natural mother and placing him with the Respondents no matter how painful it might be at this point to the child. This simply cries out against what we know as a society to be right from wrong.

Separate and distinct from placement with Respondents being against public policy, it would debilitate the entire foster care system. The primary goal of the foster care program the Respondents were involved in was for them to bond with Angelo. *RP 661.* Ms. Hayden explained the foster care system in that "if we can help establish a secure attachment for children, that we can move them more easily and safely, that their development, their sense of self, that their identity, that their general well-being and health is much better and it's much healthier and easier to move a child in a positive fashion who has experienced a secure attachment. So we do attach children, and that's very important. *RP 662.* It was normal and important that Angelo attached to the Respondents. *RP 662.* The bond he developed with the Respondents was very important to his successful reunification and potential bond with his mother, Ms. Cork. When asked

how she would feel about the foster care system if the Washington court used the bond between the Respondents and Angelo to transfer custody to Respondents. Ms. Hayden emphatically stated, "It would take us back to the 1960s. I would hesitate to place any child in foster care if the important attachment that we try to help development and a healthy attachment that we try to develop for these children, a security and a safety, if that were the reason that a foster parent could say, 'this child belongs to me,' I would seriously consider reexamining placing any child in anybody's or licensing foster parents. I don't know how we could do it." *RP 663.*

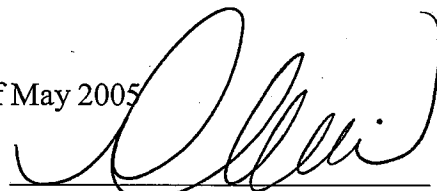
David Sturm, the social work supervisor in Montana concurred with Ms. Hayden's fears in that Angelo is the only one being hurt because the Respondents "used that [bond] to interfere... this hurt the bond between Angelo and [Ms. Cork] by [Respondents] interfering..." *RP 717* Furthermore, the Respondents re-involvement in Angelo's life had an effect on how he viewed his mother, Ms. Cork. *RP 720*

This evidence critically indicates that the formation of such a bond is not an anomaly to be recognized as a basis for transferring permanent custody to foster parents, but more importantly that such a bond should not be used to transfer custody. If it is used as a basis to now expand Washington's NonParental Custody statute even further, its implications

can be far-reaching and place a natural parent's constitutional rights in grave danger. If meddling foster parents are allowed to use a bond they create with a child to obtain custody away from the child's biological parent, Washington courts will be flooded with these cases. Montana already said this is not what they wanted to happen; Washington should follow suit.

Holly Cork respectfully request this court reverse the trial court order granting the NonParental Custody Petition and return her son back to her care and custody.

Respectfully submitted this 6th day of May 2005

A handwritten signature in black ink, appearing to read 'Andrea Poplawski', written over a horizontal line.

Andrea Poplawski, WSBA # 32246
Attorney for Holly Cork


Certificate of Service

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled **Appellant's Reply Brief** on the following individuals:

David J. Crouse
W. 422 Riverside, Suite 518
Spokane, WA 99201

☒ Via Messenger
☐ Via Mail
☐ Via Facsimile

DATED this 6th day of May, 2005.


Andrea Poplawski